85-2620

Supreme Court, U.S.
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No.

*In The*

# Supreme Court of the United States

OCTOBER TERM, 1985

**CORDIS CORPORATION,**

**Petitioner,**

vs.

**MEDTRONIC, INC.,**

**Respondent.**

## PETITION FOR WRIT OF CERTIORARI AND, IN THE ALTERNATIVE, FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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## QUESTIONS PRESENTED

1. Did the Court of Appeals err in refusing to grant CORDIS' Petition for Writ of Madamus to the District Court requiring it to grant CORDIS' Motion To Dismiss for improper venue where:

(1) there is no "rational and substantial legal argument" in support of the District Court's conclusion that CORDIS has a "regular and established place of business" in the district, as required by 28 U.S.C. 1400(b);

(2) the District Court's interpretation of the patent venue statute is contrary to the plain language of the statute, Supreme Court authority, and Congressional intent; and

(3) the District Court's interpretation of the patent venue statute is not, from a practical standpoint, correctable on an appeal of the merits.

## PARTIES TO THE PROCEEDING

The parties to the proceeding below are CORDIS CORPORATION, defendant in the District Court and Petitioner in the Court of Appeals, and MEDTRONIC, INC., plaintiff in the District Court.[1]

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[1] Pursuant to Rule 28.1, CORDIS CORPORATION has no parent company or wholly owned subsidiary. It is affiliated with Cordis-Dow, of Midland, Michigan.

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## PETITION FOR WRIT OF CERTIORARI AND, IN THE ALTERNATIVE, FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Petitioner, CORDIS CORPORATION (hereinafter CORDIS), petitions for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit and, in the alternative, for a writ of Mandamus directing the Court of Appeals for the Federal Circuit to vacate its Order of July 10, 1985, denying CORDIS' Petition for Writ of Mandamus, and to act on the merits of CORDIS' Petition.

## OPINIONS BELOW

The Appellate Court's Order of July 10, 1985, denying CORDIS' Petition for Writ of Mandamus, is not officially reported and is included in the Appendix to this Petition at pages A1—A6. CORDIS' Petition for Rehearing of the Order of July 10, 1985, was denied on August 7, 1985, without opinion (A7).

The Order of the District Court denying CORDIS' Motion to Dismiss (entered on January 16, 1985) is not officially re-

ported, and is included in the Appendix to this Petition at pages A9-A14.

## JURISDICTIONAL STATEMENT

The Order of the Court of Appeals for the Federal Circuit was entered on July 10, 1985, and a timely Petition for Rehearing was denied on August 7, 1985.

This Court has jurisdiction under 28 U.S.C. 1254(1) and 28 U.S.C. 1651(a).

## THE STATUTE INVOLVED

28 U.S.C. 1400(b):

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

## STATEMENT OF THE CASE

The facts in this case are not in substantial dispute. The only questions presented are interpretation of the patent venue statute, 28 U.S.C. 1400(b), and application of that venue statute to the present facts.

### 1. Background Facts

On February 10, 1984, MEDTRONIC filed a Complaint in the United States District Court for the District of Minnesota (where MEDTRONIC is located) alleging that CORDIS infringed four United States Letters Patents relating to electronic heart pacemakers. On May 16, 1984, CORDIS filed a Declaratory Judgment action in Miami, Florida (where CORDIS is located) alleging that the four patents in the Minnesota action are invalid, not enforceable, and not infringed. On May 15, 1984, one day prior to filing the Declaratory Judgment action, CORDIS filed a Motion to Dismiss the present Minnesota action for

improper venue, on the ground that CORDIS does not have a "regular and established place of business" in the District of Minnesota as required by the patent venue statute, 28 U.S.C. 1400(b).

CORDIS is a Florida corporation, with its principal place of business in Miami, Florida. CORDIS sells various products, including electronic heart pacemakers which are charged to infringe the patents in suit. CORDIS has twelve divisional offices in eleven different states, but does not have any office in the State of Minnesota and is not registered to do business in Minnesota. CORDIS does not have any warehouse, showroom, sales office, or display area in the State of Minnesota, and does not own or lease any real estate in Minnesota.

CORDIS' sales activities in Minnesota are conducted by two salesmen, who live there. These salesmen sell CORDIS products exclusively, and are paid a salary plus commission by CORDIS. They are also furnished with a company-owned car.

The CORDIS salesmen do not approve sales or collect money for sales. Sales orders for pacemakers are submitted to CORDIS at CORDIS' Miami headquarters for acceptance or rejection. CORDIS typically fills orders for its pacemaker products by shipping goods directly from its Miami headquarters to the local hospital. In an emergency, pacemakers may be transferred from a salesman's inventory to the particular hospital, with later billing to the hospital, and subsequent replacement of the diminished inventory. The inventory which is maintained by the salesmen is worth approximately $30,000 to $60,000. However, each cardiac pacemaker with accompanying leads costs approximately $5,000, and the typical saleman's inventory may be stored in a container the size of an ordinary shoe box.

In addition to their sales activity, the CORDIS salesmen provide technical consultation to purchasers of CORDIS pacemakers and are sometimes present during surgical procedures for implanting the pacemakers. They may also provide technical information to physicians following surgical implantation.

CORDIS' salesmen work out of their homes. CORDIS has no ownership or control over the residences of their salesmen. The salesmen's homes serve only as residences for the salesmen and their respective families, although the salesmen occasionally do paperwork at their home and store product samples and literature (when they are not traveling) in their homes. Their homes do not have any CORDIS indicia or signs, and are not listed under any CORDIS telephone numbers. CORDIS does not reimburse the salesmen for any expenses related to their homes (The salesmen individually take income tax deductions for business related expenses at their homes).

The salesmen employ a telephone answering service (for which they are reimbursed by CORDIS) to receive business telephone calls and mail. The answering service is entirely independent of CORDIS. There are no CORDIS signs and CORDIS is not listed on any building directory at the telephone answering service. The telephone answering service simply answers calls to a CORDIS telephone number listed in the local telephone directory and receives CORDIS' mail and packages for the salesmen.

2. **The District Court Liberally Construed The Patent Venue Statute As Requiring Only A Business Presence.**

On or about May 15, 1984, CORDIS filed a Motion to Dismiss the Minnesota action for improper venue under 28 U.S.C. 1400(b). While implicitly acknowledging that CORDIS did not have an actual place of business in Minnesota, and paying lip service to the Supreme Court's directive that Section 1400(b) is not to be liberally construed, *Schnell* v. *Peter Eckrich & Sons*, 365 U.S. 260, 264 (1961), the District Court denied CORDIS' Motion to Dismiss on January 16, 1985 (A9-A12).

The District Court relied on several District Court cases which liberally construed Section 1400(b) as requiring something less than an actual place of business:

> This court agrees with the court in *Instrumentation Specialties Co.* v. *Waters Associates, Inc.*, 196 USPQ at 689.

> We find it hard to believe that "a regular and established place of business" is to be read so narrowly as to require some fixed physical location which can be said to be the regular and established place of business contemplated by 1400(b).

As that court went on to state, to hold otherwise would be to "invite gamemanship to avoid venue in a district in which a defendant has innumerable significant business activities" and to "exalt form over substance to an indefensible degree."

Having concluded held that "regular and established place of business" means nothing more than "significant business activity," the District court held that the cases relied upon by CORDIS, which require an actual physical place of business, were not controlling.

### 3. The Court Of Appeals Refused To Review The Merits Of The District Court's Denial Of CORDIS' Motion

On February 5, 1985, CORDIS petitioned the Court of Appeals for the Federal Circuit for a Writ of Mandamus directing nullification of the District Court's Order and dismissal of the Minnesota action.

On July 10, 1985, after a full briefing of the issues, the Court of Appeals denied CORDIS' Petition for Writ of Mandamus. The Court of Appeals specifically took note of the absence of the Supreme Court authority on the issue raised by CORDIS:

> While the Supreme Court has stated that the provisions of § 1400(b) are not to be liberally construed, it has yet to address the issue of whether it is necessary to show that a corporate defendant maintains a fixed physical location within a jurisdiction in order to find that it has an established place of business as required by § 1400(b), (A5).

In reliance on an aberrational minority view of the Courts, the Court of Appeals concluded that there was a "rational and substantial legal argument" in support of the District Court's denial of CORDIS' Motion to Dismiss. Accordingly, the Court of

Appeals refused to grant CORDIS' Petition for Writ of Mandamus, even though in a normal appeal it might find reversible error.

On July 24, 1985, CORDIS filed a timely Petition for Rehearing of its request for a Writ of Mandamus. The Petition for Rehearing was denied without opinion on August 7, 1985.

## ARGUMENT

### I. THERE IS NO "RATIONAL AND SUBSTANTIAL LEGAL ARGUMENT" WHICH SUPPORTS THE APPELLATE COURT'S REFUSAL TO GRANT CORDIS' PETITION FOR WRIT OF MANDAMUS

#### A. The Authority Relied Upon In Denying CORDIS' Motion To Dismiss Is Not "Rational."

The District Court's denial of CORDIS' Motion to dismiss is not "rational" because it is directly contrary to the plain language of the patent venue statute, Supreme Court authority, and Congressional intent.

The terms of 28 U.S.C. 1400(b) are direct and unambiguous:

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement *and has a regular and established place of business.*

Accordingly, the accused infringer (unless it resides within the district) must not only have a place of business in the district, but a place of business which is both "regular" and "established." As the Court of Appeals said in *Phillips* v. *Baker*, 121 F.2d 752, 755-56 (9th Cir. 1941).

> [T]he words themselves necessarily indicate that an 'established' place of business is more than, or at the very least, different from merely a 'place of business.' Otherwise, Congress used a meaningless word, with a result, which surely could not have been intended and should not be inferred, unless no other construction is possible. It is, however,

> entirely clear, that the word was selected deliberately to signify that the particular place of business contemplated was not any place where business might be transacted, however temporarily, but must be a permanent place of business.

Thus, the language of the statute itself provides no "rational" argument that "regular and established place of business" only means "significant business activity" and, indeed, provides a powerful argument *against* such an interpretation.

In *Schnell* v. *Eckrich & Sons*, 345 U.S. 260, 264 (1961), this Court stated with respect to the provisions of 28 U.S.C. 1400(b) (quoting from *Olberding* v. *Ill. Cent. R. Co.*, 346 U.S. 338, 340 (1913)):

> The requirement of venue is specific and unambiguous; it is not one of the vague principals which, in the interest of some overriding policy is to be given a 'liberal construction.'

Thus, this Court has not found the patent venue statute either ambiguous or otherwise deserving of a broad liberal construction. Accordingly, the decisions of this Court do not provide any rational argument in support of the District Court's denial of CORDIS' Motion and, indeed, provide authoritative reasons *against* such an interpretation.

The statutory history does not lend support to the District Court's interpretation of Section 1400(b). As this Court pointed out clearly in *Schnell* v. *Peter Eckrich & Sons*, *supra*, and in predecessor cases,

> Congress adopted the predecessor to § 1400(b) as a special venue statute in patent infringement actions to eliminate the 'abuses engendered' by previous venue provisions allowing such suits to be brought in any district in which the defendant could be served . . . The act was designed 'to define the exact jurisdiction of the . . . courts in these matters' . . . and not to 'dovetail with the general [venue] provisions', *Id.* at 262.

Thus, it was clearly the Congressional intent that 1400(b) provide exact jurisdictional parameters and that it *not* simply "dovetail"

with the general venue provisions as the District Court would believe. Accordingly, the statutory history does not provide rational argument for the District Court's interpretation of Section 1400(b) and, indeed, provides a strong argument *against* such interpretation.

Finally, the basic principles of statutory construction are forceful arguments against the District Court's denial of CORDIS' Motion to Dismiss. As interpreted by the District Court, the requirements of Section 1400(b) are satisfied when there is significant business activity within the district. The result of such an interpretation, however, is to render Section 1400(b) essentially equivalent to the general venue statute, 28 U.S.C. 1391(c), which requires "doing business" within the district. It is a fundamental premise of statutory construction (and common sense) that different statutes with language of clearly different breadth are intended to have different scope. The effect of the District Court's interpretation of Section 1400(b) is to nullify the explicit differences between those statutes.

In summary, the District Court's interpretation is a glaring and fundamental misconstruction of the patent venue statute and is not "rational," whether measured against the very language of the statute, Supreme Court authority, legislative history, or basic principles of statutory construction. In fact, when measured against these factors, it is abundantly clear that the District Court's ruling is plainly and simply wrong.

### B. The Authority Relied Upon In Denying CORDIS' Motion To Dismiss Is Not "Substantial"

The legal authorities cited by the District Court in denying CORDIS' Motion To Dismiss are not substantial because the cases relied upon are isolated aberrations from an otherwise uniform and logical body of law that has evolved continuously for many years.

Just as this Court has repeatedly stated that the terms of Section 1400(b) (or its predecessors) are clear and unambiguous, and definitively proscribe patent venue, the overwhelming major-

ity of Courts have construed Section 1400(b) as requiring just what it says—an actual place of business in the district. For example, in *Phillips* v. *Baker*, discussed above, the Ninth Circuit specifically held that the language of 28 U.S.C. 1400(b) requires an actual, i.e., permanent, place of business:

> It is, however, entirely clear that the word [established] was selected deliberately to signify that the particular place of business contemplated was not anyplace where business might be transacted, however temporarily, *but must be a permanent place of business*, (emphasis added) 121 F.2d at 756.

Similarly, in *University of Illinois Foundation* v. *Channel Master*, 382 F.2d 516 (7th Cir. 1967), the Court of Appeals affirmed the dismissal of an infringement action for improper venue, because the defendant did *not* have "a regular and established place of business" in the district, although its salesman resided in the district and worked out of his home (as did CORDIS' salesmen).

A similar decision was reached by the District Court of Minnesota (in which the present action was filed) in *Up-Right, Inc.* v. *Aluminum Safety Products, Inc.*, 165 F. Supp. 742 (D. Minn. 1958). In *Up-Right*, the Court granted defendant's Motion to Dismiss on the ground of improper venue. The defendant was not licensed to do business in Minnesota and employed a sales representative who resided in Minnesota to solicit business and take orders for the defendant's product. The defendant's sales representative worked out of his home, and made no collections from customers. After reviewing all of these facts, which are "on all fours" with the facts in the present Minnesota case, the Court held that the defendant did *not* have a "regular and established place of business" in Minnesota.

In *Grantham* v. *Challenge-Cook Brothers, Inc.*, 420 F.2d 1182 (7th Cir. 1969), the Court of Appeals for the Seventh Circuit reaffirmed the criteria for establishing venue in a patent infringement action previously set forth in *Channel Master*.

Likewise, in *American Cyanamid Company* v. *Nopco Chemical Company*, 258 F. Supp. 506 (W.D.Va., Charlottesville Div. 1967), the regional sales manager of defendant Nopco resided in the district and Nopco provided him with an automobile. The sales manager had a personal office, with a desk and shelves, where he could store materials he received in relation to his job. At times he required the services of a part-time secretary whom he paid but was reimbursed by Nopco. The Court held that patent venue did *not* properly lie in the district, stating:

> The facts in this case establish the existence of a physical location where an employee of Nopco carries on part of his work. They do not establish a place of business of the defendant corporation. The distinction is fundamental and, in view of the restrictive interpretation to be given § 1400(b), controlling. . . . The physical location in one's home at which one carries out a portion in one's duties connected with one's employment is generally not a physical location over which the employer exercises some measure of control. That is precisely the situation here, 268 F. Supp at 509-510.

The Court of Appeals affirmed the District Court (388 F.2d 818 (4th Cir. 1968)), stating:

> the statute clearly requires that venue be laid where 'the defendant...has a regular and established place of business', not where the defendant's employee owns a home in which he carries on some of the work that he does for the defendant, 388 F.2d at 820.

These are but a few of the great majority of cases properly interpreting the patent venue statute as requiring that the defendant have an actual "place of business" within the district. In any event, the overwhelming majority view of Section 1400(b) is contrary to the District Court's opinion and provides no "substantial" argument for the District Court's denial of CORDIS' Motion to Dismiss.

### C. Mandamus Will Issue To Correct A Clear Misinterpretation Of An Unambiguous Statute

The Court of Appeals declined to grant CORDIS' Petition for Writ of Mandamus because a perceived "rational and substantial legal argument" supported the District Court's decision.

As demonstrated above, and as repeatedly held by the Supreme Court, the language of the patent venue statute is specific and unambiguous. Supreme Court authority, Congressional intent, and principles of statutory construction provide no rational basis for ignoring the simple language of the statute and, indeed, provide overwhelming authority for a strict construction of the statute.

The fact that there are a few District Court cases, which are aberrations and contrary to the great weight of legal authority, does not give rise to a rational and substantial legal argument which would justify refusing to issue a Writ of Mandamus to correct a clear wrong. The present case is the very situation in which a Petition for Writ of Mandamus is appropriate and is in aid of this Court's jurisdiction.

As the Court of Appeals said in *Holub Indus., Inc.* v. *Wyche*, 290 F.2d 852, 856 (4th Cir. 1961) (concerning whether an accused infringer had a regular and established place of business in the district):

> We are advertent to the decisions in this and other courts which hold that the writ of mandamus is an extraordinary remedy to be used reluctantly and only in exceptional cases where it is beyond dispute that the trial court has failed to exercise its functions or has sought to exercise jurisdiction which it does not possess. (citations omitted) In the pending case, however, it is clear beyond doubt that the court has no jurisdiction over Holub, because it has no residence and no legal or established place of business in South Carolina. The issuance of the writ of mandamus is therefore justified.

In the present case, just as in *Holub*, the facts are not in dispute and the language of the statute is specific and unambiguous. CORDIS does *not* have a regular and established place of business in Minnesota, and there is no rational or substantial legal argument which justifies ignoring the explicit statutory language.

Mandamus to correct the District Court's denial of CORDIS' Motion to Dismiss (and the Court of Appeals' refusal to issue a Writ of Mandamus) is appropriate and is in accord with this Court's efficient administration of justice and of the appellate process.

## II. CORRECT INTERPRETATION OF THE PATENT VENUE STATUTE IS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT OR THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In *Fourco Glass Co.* v. *Transmirra Prods. Co.*, 353 U.S. 222 (1957), this Court held that 28 U.S.C. 1400(b) is the exclusive statute controlling venue in patent infringement cases. Thus, the statute is pertinent to every patent infringement action brought in the United States, and proper interpretation is important not only to the parties here, but to the courts and the patent bar in general.

As explained above, the patent venue statute is subject to conflicting interpretation as to the meaning of "regular and established place of business." The great majority of cases construe Section 1400(b) in accordance with the plain meaning of the words—i.e., requiring an actual, physical business location. A few cases, however, which the District Court here relied upon, apply a liberal construction which would erroneously substitute "business presence" or "doing business" for "regular and established place of business."

The Court of Appeals' Order of July 10, 1985, does nothing to clarify or resolve the conflict concerning the patent venue statute and, if left undisturbed, will likely compound and prolong the present uncertainty. Strictly interpreted, the Order does not resolve the conflict concerning Section 1400(b). However, portions of the Order may be interpreted as endorsing the liberal construction of Section 1400(b). These portions of the Order will certainly provide clear support for any patentee urging a liberal interpretation of the patent venue statute.

Hence, if strictly interpreted, the July 10, 1985 Order does nothing to harmonize the patent law and allows the present conflict to continue. If construed as endorsing the minority view, it creates further obfuscation and uncertainty as to the proper meaning of "regular and established place of business."

Proper interpretation of that statute is important to the patent bar, which must apply the statute on a day-to-day basis—and to the District Courts, which are the front-line arbiters of venue disputes. This case presents the patent venue issue with even greater clarity, vigor, and importance than will be present after a hearing on the merits. Now is the time for this Court or the Court of Appeals for the Federal Circuit to put this conflict to rest.

## III. THE COURT OF APPEALS' REFUSAL TO GRANT THE PETITION FOR WRIT OF MANDAMUS PRECLUDES FAIR CONSIDERATION OF THE MERITS OF THIS ISSUE BY AN APPELLATE COURT.

If the Appellate Court's Order remains unchanged, this case will proceed to full discovery and trial on the merits of the patent infringement issue. Only after a trial on the merits will the issue of venue be subject to review, together with all of the other issues on the merits, namely, patent validity, enforceability, and infringement.

### A. If Not Considered Now, It Is Unlikely That The Venue Question Will Be Subject To Critical Review On Appeal

If the Court of Appeals does not consider the merits of the venue issue at this time, it is unlikely that the issue will be presented as forcefully or reviewed as critically after a full hearing on the patent issues.

Unless the venue question is addressed now, CORDIS must undergo the expense of full discovery on the patent merits, the expense of a full trial on the merits, the expense of post-trial briefs and/or hearings on the merits, and the expense of a full appeal on the merits—all before the venue issue can be addressed by the

Court of Appeals. Under these circumstances, CORDIS will in all probability have expended well over $100,000.00, as well as a great deal of time and effort, in defending the patent infringement action on the merits.

At that time, all of the relevant patent issues will have been resolved by the District Court, and all of the issues on the merits will have been fully briefed before the Court of Appeals. Realistically, however, at the end of this appellate trail, the venue issue will be of greatly diminished importance. It is unlikely that the parties will be willing to devote the necessary time and resources to the venue issue and it is problematic whether an appellate court would be eager to reverse a district court on venue grounds *after* a full trial on the merits. In fact, after a trial on the merits, it will apparently be CORDIS' burden to demonstrate that denial of its Motion to Dismiss was "prejudicial" error, *Cf. Pennsylvania* v. *Taylor*, 393 A.2d 929 (1978), a burden substantially greater than proving that the District Court was clearly erroneous.

Expressed in another way, the Court of Appeals' refusal to grant (or consider the merits of) CORDIS' Petition for Writ of Mandamus has the practical and illogical effect of postponing the venue issue from the present time, when it is ripe, fully briefed, and of singular importance, until after a hearing of the patent merits, when venue will be of greatly lessened significance to the parties and to the courts. Indeed, the Court of Appeals' decision not to address the venue issue effectively deprives CORDIS of any real opportunity of having the District Court's important and highly doubtful ruling carefully and critically reviewed by the Court of Appeals.

### B. This Case Is Ripe For Decision It Meets All Of The *Cohen* Requirements

The facts and the law have been fully developed and the patent venue issue should be decided now. The potential detriment to CORDIS if the venue issue is not considered at this time substantially outweighs any policy considerations against piecemeal appeal.

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court held that certain orders otherwise considered interlocutory, would be appealable when they:

> finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated, *Id.* at 546.

For the very reasons set forth in *Cohen* , the venue question presented here is also appropriate for decision. The interpretation of the patent venue statute raised by this Petition is a serious and unsettled question, just as was the issue in *Cohen*. As demonstrated above, the patent venue statute is subject to conflicting interpretation concerning the meaning of "a regular and established place of business." If left undisturbed, the Court of Appeals' Order, which is itself subject to misinterpretation and misapplication, will prolong and compound the present conflict with respect to the patent venue statute.

Just as in *Cohen*, the application of the patent venue statute is essentially independent of the underlying cause of action. Just as in *Cohen*, the question of venue bears no relationship to the issues of patent validity, enforceability, or infringement. Just as in *Cohen*, there is no good reason to defer the issue of venue until the whole case is adjudicated. Just as in *Cohen*, the venue issue does not involve a Court's discretionary application of the facts to the law, but involves a question of the proper interpretation of the law.

Although the venue issue is procedurally before this Court on a Petition from the Court of Appeals' denial of CORDIS' Petition for Writ of Mandamus, the rationale and fundamental fairness which underlies the holding *Cohen* applies just as vigorously here and now as it would have in a situation where a defendant attempted to directly appeal a District Court's denial of a Motion to Dismiss for lack of venue.

**C. Failure To Consider The Venue Issue Now Will Result In Grossly Unequal Treatment For Plaintiffs and Defendants In Patent Cases.**

If CORDIS had prevailed and the District Court granted CORDIS' Motion to Dismiss, that decision would have been directly appealable under 28 U.S.C. 1291 on the very same record and with the same urgency and clarity as it is presented in this Petition. In this situation, the Court of Appeals would have automatically reviewed the venue issue.

However, CORDIS did not prevail and the Court of Appeals avoided review of the patent venue issue by denying CORDIS' Petition for Writ of Mandamus. If the Court of Appeals' denial remains unchanged, its July 10, 1985, Order will have the effect of elevating patentee-plaintiffs to a privileged position and placing accused defendants in a substantially disadvantaged position. Under the Court of Appeals' Order of July 10, 1985, defendants in patent infringement actions will be unable to obtain review of adverse venue decisions until after an appeal on the merits—whereas plaintiffs in patent infringement actions will be able as a matter of right to seek immediate review of adverse venue decisions.

A plaintiff's appeal from an adverse venue decision will be at a time when there has been minimum expense and maximum attention to the venue issue. On the other hand, a defendant's appeal from an adverse venue decision will only be reviewed after defendant has undergone the expense of full discovery and trial on the merits, post-trial briefs and/or hearings on the merits, and preparation of any appeal on the merits (assuming the defendant is unsuccessful at trial). This unintentional and different treatment of plaintiffs and defendants in patent infringement actions creates a "serious and critical ill"—and, in all probability, constitutes a denial of equal protection of the laws and/or due process to defendants, in violation of the Fifth and/or Fourteenth Amendment of the U.S. Constitution.

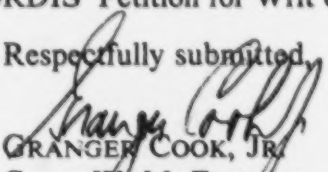
## IV. CONCLUSION

For the reasons set forth above, there is no "rational or substantial legal argument" which supports the Court of Appeals' refusal to grant CORDIS' Petition for Writ of Mandamus. The denial of CORDIS' Motion to Dismiss is based on a plain misreading of Section 1400(b), which is contrary to the specific language of the statute, Supreme Court authority, Congressional intent, and basic principles of statutory construction.

The patent venue statute raises important federal questions of wide-ranging importance, and unless resolved by this Petition, CORDIS will be effectively deprived of an opportunity for critical review of the patent venue issue on appeal. At the present time the issue is fully briefed, of singular importance, and is ripe for disposition. After discovery and trial of the merits, the issue will be stale and of greatly diminished importance to the parties and the Court. Failure to address the venue issue now will result in fundamentally unfair treatment to CORDIS, and similarly situated defendants, thereby resulting in a denial of equal protection to all.

A Petition for Writ of Certiorari should be issued for a review of the patent venue issue and the propriety of the Court of Appeals' refusal to grant CORDIS' Petition for Writ of Mandamus. Alternatively, a Writ of Mandamus should issue directing the Appellate Court to vacate its Order of July 10, 1985 and to consider the merits of CORDIS' Petition for Writ of Mandamus.

Respectfully submitted,



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# APPENDIX

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**United States Court of Appeals for the Federal Circuit**

| | |
|---|---|
| IN RE: CORDIS CORPORATION<br>*Petitioner.* | **Miscellaneous Docket No. 53 ON PETITION FOR A WRIT OF MANDAMUS** |

Before MARKEY, *Chief Judge,* FRIEDMAN, and RICH, *Circuit Judges.*

## ORDER

Cordis Corporation (Cordis) has petitioned for a writ of mandamus ordering the United States District Court, District of Minnesota, to dismiss the present action for improper venue. We deny the petition.

### I.

On February 10, 1984, Medtronic, Inc. (Medtronic), a Minnesota corporation with its principal place of business in Minneapolis, Minnesota, filed a complaint in the United States District Court for the district of Minnesota against Cordis alleging patent infringement with respect to four patents owned by Medtronic, as a result of Cordis' sales of implantable heart pacers in Minnesota.

Cordis, a Florida corporation, with its principal place of business in Miami, Florida, filed a motion to dismiss pursuant to Rule 12(b), Fed. R. Civ. P., challenging venue on the basis that Cordis does not have a regular and established place of business in the district of Minnesota. Cordis also contended that no acts of infringement occurred in Minnesota as it claimed that all sales are completed in Florida. The district court denied Cordis' motion to dismiss finding that venue was properly laid in Minnesota.

In its petition for mandamus, Cordis has not specifically challenged any of the incidental factual findings of the district court contained in the district court's memorandum and order dated January 16, 1985, wherein the court denied Cordis' motion

to dismiss. Cordis does, however, challenge the court's finding that it has a regular and established place of business in Minnesota, and that it has committed acts of infringement therein, so as to come within the scope of 28 U.S.C. § 1400(b).

Venue in patent infringement actions is controlled exclusively by 28 U.S.C. § 1400(b) which provides:

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

For purposes of the patent venue statute, a corporation is a resident only of the state in which it is incorporated. *Fourco Glass Co.* v. *Transmirra Co.*, 353 U.S. 222 (1957). Accordingly, Medtronic is relying upon the second test to demonstrate that venue for this action is proper in Minnesota.

The undisputed facts as found by the district court may be summarized as follows. Cordis is a Florida corporation with its principal place of business in Florida, which sells cardiac pacemakers. To market its pacemakers in Minnesota, Cordis employs two full-time sales representatives, William R. Rutstein and Dixon P. Dahlberg, each based in Minnesota. Both are paid a salary plus commission and they work exclusively for Cordis, which supplies them each with a company owned car.

Cordis is not registered to do business in Minnesota. It does not have a bank account, and it neither owns nor leases an office, house nor any property within the state. Rutstein and Dahlberg maintain offices in their homes. They store Cordis literature, documents and products there. They also complete their paperwork and do other administrative tasks in their home offices. Both claim an income tax deduction for these offices. Rutstein generally keeps about $30,000 worth of Cordis products in his home office while Dahlberg usually has approximatley $60,000 worth of Cordis products on hand.

Cordis has engaged a secretarial service in Minnesota, named "I Got It Secretarial", to receive messages, provide typing

services, mail Cordis literature and receive shipments of Cordis sales literature. Cordis pays for this service either directly or through reimbursing Rutstein and Dahlberg for any payments made by them. The business cards of Dahlberg and Rutstein list the telephone number answered by the secretarial service. Phone calls to this number are answered "Cordis Corporation." The Minneapolis telephone directory includes Cordis' name and telephone number and lists the address of the secretarial service as Cordis' address. Cordis' name however does not appear on the directory of the building occupied by the secretarial service.

Manufacturers of cardiac pacemakers generally market their products through sales representatives who call on physicians or other personnel at the physician's offices or at the hospitals. Hospitals or physicians may order the Cordis pacemakers in several ways. They may order them directly from Cordis' Florida office to be held on consignment at the hospital. In this case, the orders may be placed for the hospital by Cordis' Minnesota sales representatives. However, if a hospital does not wish to maintain a stock of the pacemakers, it may obtain the device directly from the Cordis sales representative before surgery. In this manner the pacemaker is provided to the hospitals from the stock kept by the sales representative and the device is obtained without a formal purchase order. Following the surgery, Rutstein and Dahlberg file the necessary paperwork to obtain payment for the device and to obtain a replacement for their inventory.

In addition to acting as sales representatives, Rutstein and Dahlberg act as technical consultants and in this capacity they are present in the operating room during a significant number of surgical implantations of Cordis pacemakers. During the implantation they provide technical product information to the physician. In addition, they provide post-implantation consultations. Both men also give presentations to small groups of medical personnel regarding technological developments.

In light of Cordis' activities in Minnesota and in light of the nature of the particular business involved, the district court found that the fact that Cordis' representatives do not perform

their sales functions from a fixed, physical location such as a rented office space, was not determinative of the issue of whether Cordis maintained a regular and established place of business in Minnesota.

The district court also found that Cordis has committed acts of infringement within Minnesota as a result of its continuous solicitation of sales by its resident representatives, coupled with their demonstrations and technical consultations concerning the pacemakers.

Before this court, Cordis contends that the fact that it does not rent or own a fixed physical location within Minnesota absolutely precludes a finding that it has a regular and established place of business as required by § 1400(b). Cordis further contends that no acts of infringement were committed within the district as all sales occurred in Florida. Thus, Cordis urges that this court issue a writ of mandamus against the district court directing dismissal of this action.

## II.

Pursuant to the All Writs Act, 28 U.S.C. § 1651(a) (1976), this court has the authority to issue the requested writ as "necessary or appropriate in aid of" our jurisdiction. *Mississippi Chemical Corp.* v. *Swift Agricultural Chemicals Corp., 717 F.2d 1374, 1379, 219 USPQ 577 (Fed. Cir. 1983).*

The use of mandamus however is limited to exceptional circumstances to correct a "clear abuse of discretion or 'usurpation of judicial power' " by the trial court. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382 (1953) (quoting *De Beers Consolidated Mines* v. *United States, 325 U.S. 212, 217 (1945).*

Thus in *Mississippi Chemical*, this court issued the writ to correct the district court's failure to protect the rights accorded to an alleged infringer under *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971). In *Mississippi Chemical*, the right of petitioner to the requested

relief was clear in light of the Supreme Court's specific ruling on the question before the court below.

In the instant case, however, Cordis' right to the requested relief is by no means clear. The Supreme Court has held that § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions, and that it is not to be supplemented by the provisions of 28 U.S.C. § 1391(c), having to do with general corporation venue, *Fourco Glass Co.* v. *Transmirra Corp.* The Supreme Court has also held that where a corporate defendant had no place of business within a jurisdiction, its actions in assuming control of patent litigation against one of its customers did not constitute a waiver of the venue requirement of 28 U.S.C. § 1400(b) so as to permit it to be named as party defendant. *Schnell* v. *Peter Eckrich & Sons*, 365 U.S. 260 (1961).

Thus, while the Supreme Court has stated that the provisions of § 1400(b) are not to be liberally construed, it has yet to address the issue of whether it is necessary to show that a corporate defendant maintains a fixed physical location within a jurisdiction in order to find that it has an established place of business as required by § 1400(b).

Cordis relies strongly upon the language utilized by the Court of Appeals for the Ninth Circuit in *Phillips* v. *Baker*, 121 F.2d 752, 50 USPQ 540 (9th Cir.), *Cert. denied*, 314 U.S. 688 (1941) to support its claim that a "regular and established place of business," requires a specific permanent physical location. However, at issue in *Phillips* was whether venue was proper in California for a Florida corporation which provided a seasonal pre-cooling operation for grain shippers which was conducted by means of a fully transportable apparatus which was assembled at each location, kept in place until the procedure was performed and then dismantled for conveyance to the next location either within or without the jurisdiction. The facts in *Phillips* indicated that the Company's presence within the district was merely temporary, and there was no way to contact its representatives except by communication with the home office in Florida. These facts were very different from those before the district court concerning Cordis' activities within Minnesota.

Cordis also cites *University of Illinois Foundation* v. *Channel Master*, 382 F.2d 514, 155 USPQ 117 (7th Cir. 1967) wherein the Court of Appeals for the Seventh Circuit upheld the dismissal for lack of proper venue of a patent infringement suit against a New York manufacturer of television antennas where the facts demonstrated that its sole employee worked from his home in Illinois promoting sales of his employer's products. All orders from customers were accepted in the New York home office, all shipments were made from the home office to customers and all payments by customers were made to that office. Unlike Cordis' representatives who continually maintain a stock of its products within the district, the sales representative in *Channel-Master* kept no stock or samples of the products. Additionally, while there was evidence that the sales representative therein conducted seminars with distributors to promote his employer's products, there was no evidence to demonstrate that such activities were carried on concerning the specific product which was the subject of the infringement action.

These cases indicate that in determining whether a corporate defendant has a regular and established place of business in a district, the appropriate inquiry is whether the corporate defendant does its business in that district through a permanent and continuous presence there and not as Cordis argues, whether it has a fixed physical presence in the sense of a formal office or store.

With respect to the question of whether Cordis has committed acts of infringement within the jurisdiction, Cordis has not demonstrated that the district court's conclusion on this point constitutes an abuse of discretion, such that it warrants the extraordinary remedy of mandamus.

In so ruling, however, we express no opinion on whether there has been infringement; that is a question to be determined at trial. "[T]he issue of infringement is not reached on the merits in considering venue requirements." *Gunter & Cooke, Inc.* v. *Southern Electric Service Co.*, 256 F. Supp. 639, 648, 149 USPQ 438, 446 (M.D.N.C. 1966), *aff'd* 378 F.2d 60, 153 USPQ 655 (4th Cir. 1967).

As noted by our predecessor court the remedy of mandamus is "strong medicine" to be reserved for the most serious and critical ills, and if a rational and substantial legal argument can be made in support of the rule in question, the case is not appropriate for mandamus, even though on normal appeal, a court might find reversible error. *Formica Corporation* v. *Lefkowitz,* 590 F.2d 915, 200 USPQ 641 (CCPA), *cert. denied,* 442 U.S. 917 (1979).

As the record indicates that a rational and substantial legal argument may be made in support of the court's order denying Cordis' motion to dismiss for lack of proper venue, we decline to issue the writ.

Accordingly,

IT IS ORDERED:

(1) Medtronic's motion for oral argument is denied;

(2) Cordis' motion for leave to file reply to Medtronic's answer to Cordis' petition for writ of mandamus is granted;

(3) Cordis' petition for writ of mandamus is denied;

(4) In view of disposition of Cordis' mandamus petition, Medtronic's motion to dismiss the petition is moot.

FOR THE COURT

Daniel M. Friedman
Circuit Judge

July 10, 1985

**United States Court of Appeals for the Federal Circuit**

**August 7, 1985**

**MOTIONS STAFF ATTORNEY**

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RE: *In Re: Cordis Corporation*, Miscellaneous Docket No. 53

Dear Counsel:

On August 7, 1985, the court denied Cordis Corporation's petition for rehearing.

Very truly yours,

Helen Kane
*Motions Staff Attorney*

**United States District Court**
**DISTRICT OF MINNESOTA**
**THIRD DIVISION**

**Medtronic, Inc.,**

*Plaintiff.*

vs.

**Cordis Corporation,**

*Defendant.*

**MEMORANDUM AND ORDER**
**Civil No. 3-84-136**

Before the court is defendant's motion to dismiss on the ground that venue is improper, under Fed. R. Civ. P. 12(b). Lawrence C. Brown and Robert C. Beck appear for plaintiff. Leonard J. Keyes, Granger Cook, Jr. and Hank Collins appear for defendant.

## BACKGROUND

Cordis is a Florida corporation and has its principal place of business in Florida. It sells cardiac pacemakers. These devices are usually purchased by hospitals acting at the direction of doctors for implantation into a patient. Cordis is not registered to do business in the State of Minnesota. Nor does it have a bank account in this state.

Manufacturers of cardiac pacemakers usually market their products through sales representatives. These representatives call on physicians and other hospital personnel at the physicians' offices or at the hospitals.

Cordis employs two full-time sales representatives to market their devices in Minnesota, William R. Rutstein and Dixon P. Dahlberg. Both are paid on a salary plus commission basis. Each

is supplied with a company-owned car. Both work exclusively for Cordis.

Besides acting as sales representatives, Rutstein and Dahlbery act as technical consultants.[1] As consultants, they are physically present in the operating room during a significant number of surgical implantations of Cordis pacemakers. During the actual implantation, they provide technical product information to the physician. Rutstein and Dahlberg also consult with physicians concerning post-implantation technical questions. Both men also give presentations to small groups of medical personnel regarding technological advancements.

Cordis does not own or lease any real estate in Minnesota. Nor does it have an office. Rather, Rutstein and Dahlberg maintain offices in their homes. They store Cordis literature, documents and products there. They also complete their paperwork and do other administrative tasks in their home offices. Both claim a tax deduction for these offices.

Cordis does not have a warehouse, showroom or display area in Minnesota. However, both Rutstein and Dahlberg maintain an inventory of pacemakers and pacemaker products in their homes. Rutstein generally keeps about $30,000 worth of products on hand. Dahlberg usually has $60,000 worth of Cordis products in his home.

Hospitals may order Cordis pacemakers in several ways. They may order them direct from Cordis' Florida facility to be held on consignment at the hospital. In this case, the orders may be placed for the hospital by Cordis' Minnesota representatives. If the hospital chooses not to stock pacemakers, they may obtain the device directly from Rutstein or Dahlberg before surgery. If the pacemaker is provided to the hospital from the personal stock of the sales representatives, the device is provided without a formal purchase order. Following implantation, Rutstein and Dahlberg

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[1]Bill Rutstein's business card lists his title as "Technical Consultant."

file the necessary paperwork to obtain payment for the device and to obtain a replacement for their inventory stock.

Cordis has hired "I Got It Secretarial" to receive phone messages, provide typing services, mail Cordis literature and receive shipments of Cordis sales literature. Cordis pays for this service either directly or through reimbursing Rutstein and Dahlberg for payments made by them. Cordis' name does not appear on the directory of the building occupied by "I Got It Secretarial". However, in the Minneapolis telephone directory, Cordis' address is the Eden Prairie address of the secretarial service. The business cards of Dahlberg and Rutstein also list the telephone number monitored by the secretarial service. Phone calls to this number are answered "Cordis Corporation".

## DISCUSSION

28 U.S.C. § 1400(b) is the exclusive venue statute for patent infringement actions. *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 229 (1957). This section provides

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

Section 1400(b) is not to be liberally construed in favor of venue. *Schnell* v. *Peter Eckrich & Sons*, 365 U.S. 260, 264 (1961). For purposes of 1400(b) a corporation is a resident only in the state in which it is incorporated. *Fourco Glass Co.* v. *Transmirra Products, Corp.*, *supra*. As mentioned earlier, Cordis is incorporated in Florida. Therefore, if venue is to be in this district. Medtronic must establish that Cordis has committed acts of infringement and has a regular and established place of business here.

### Regular and Established Place of Business

The case of *Mastantuono* v. *Jacobsen Manufacturing Co.*, 184 F. Supp. 178, 180 (S.D.N.Y. 1960) contains an often cited test for determining what constitutes a "regular and established place of business."

> Mere "doing business" in a district is not of itself sufficient to confer venue in patent suits. Something more is required. It must appear that a defendant is regularly engaged in carrying on a substantial part of its ordinary business on a permanent basis in a physical location within the district over which it exercises some measure of control.

Applying this test to the facts recited above, this court finds that Cordis does have a regular and established place of business. The fact that Rutstein and Dahlberg do not perform their sales functions from a fixed, physical location such as a rented office space should not determine the issue of whether Cordis has an established and regular place of business in Minnesota. Indeed, given the nature of selling cardiac pacemakers, a fixed rented office space would enhance Cordis' sales efforts little.

Other courts, under similar sets of facts, have found that venue will lie for purposes of § 1400(b). *Brunswick Corp.* v. *Suzuki Motor Co., Ltd.*, 575 F. Supp. 1412 (E.D. Wisc. 1983); *CPG Products Corp.* v. *Mego Corp.*, 214 USPQ 129 (S.D. Ohio 1980); *Instrumentation Specialties Co.* v. *Waters Associates, Inc.*, 196 USPQ 684 (N.D. Ill. 177); *Shelter-Lite, Inc.* v. *Reeves Brothers, Inc.*, 356 F. Supp. 189 (N.D. Ohio 1973).

This court agrees with the court in *Instrumentation Specialties Co.* v. *Waters Associates, Inc.*, 196 USPQ at 689.

> We find it hard to believe that "a regular and established place of business" is to be read so narrowly as to require some fixed physical location which can be said to be the regular and established place of business contemplated by § 1400(b).

As that court went on to state, to hold otherwise would be to "invite gamemanship to avoid venue in a district in which a defendant has innumerable significant business activities" and to "exalt form over substance to an indefensible degree."

Cordis urges this court to adopt the reasoning and holdings in cases such as *Dual Manufacturing and Engineering, Inc.* v. *Burris Industries, Inc.*, 531 F.2d 1382 (7th Cir. 1976); *University of*

*Illinois Foundation* v. *Channel Master*, 382 F.2d 514 (7th Cir. 1967); *Warner-Lambert Co.* v. *C.B. Fleet Comp. Inc.*, Civil Action No. 83-4536 (D.N.J. Apr. 5, 1984); *A.O. Smith-Inland, Inc.* v. *Hoeganaes Corp.*, 407 F. Supp. 539 (N.D. Ill. 1976); *Up-Right, Inc.* v. *Aluminum Safety Products, Inc.*, 165 F. Supp. 742 (D. Minn. 1958). Under the circumstances of this case these decisions are not controlling.

**Acts of Infringement**

Cordis contends that since all purchase orders are submitted to Cordis' Miami headquarters for acceptance or rejection, the sales occur in Miami, Florida pursuant to *W.S. Tyler Company* v. *Ludlow-Saylor Wire Company*, 236 U.S. 723 (1915). *See e.g., Self* v. *Fisher Controls Co., Inc.*, 566 F.2d 62 (9th Cir. 1977) (to constitute an act of patent infringement in a given district, the sale must have been consummated in that district).

Other courts have held that the focus is not merely whether the defendant was involved in the final "consummation" of the sale of the accused item in the district. Rather, the physical presence of a defendant's sales representatives in the district, their solicitation of orders there and demonstration of the item in the district constitutes an "infringing sale" for venue purposes. *Dual Manufacturing & Engineering, Inc.* v. *Burris Industries, Inc.*, 531 F.2d 1382 (7th Cir. 1976); *S.C. Johnson & Son, Inc.* v. *Gillette Co.*, 571 F. Supp. 1185 (N.D. Ill. 1983); *Ingersol-Rand Co.* v. *Rockwell Internat'l Corp.*, 420 F. Supp. 277 (S.D. Fla. 1976). This court rejects a narrow interpretation of the term "Acts of infringement" based on technicalities of sales law and holds that the continuous solicitation of sales in Minnesota by Cordis' two resident sales representatives coupled with their demonstrations and technical consulting constitute acts of infringement so as to support venue under § 1400(b).

Based on the foregoing, the record and the file, and the arguments of counsel IT IS HEREBY ORDERED that defendant's motion to dismiss this lawsuit is denied.

Dated: January 16, 1985.

ROBERT G. RENNER
United States District Judge

## CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that at least three copies of the foregoing PETITION FOR WRIT OF CERTIORARI AND, IN THE ALTERNATIVE, FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, have been mailed this 5th day of August, 1985, first-class postage prepaid, to each of the below:

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